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Town of Bolton

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TO: Siting Council ATTN: Mr. S. Derek Phelps
FAX NO: 860 827-2950 DATE: 1/17/07
FROM: Stuart Popper, Interim Town Planner

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LAND USE DEPARTMENT
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Town of Bolton

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Mr. S. Derek Phelps, Executive Director
State of Connecticut Siting Council
Ten Franklin Square
New Britain, Connecticut 06051

Dear Mr. Phelps;

Attached for you information are copies of materials from the Town of Bolton Planning and Zoning Commission's Public Hearing's held on July 12th and August 9th, 2006. These materials along with a letter from the Planning and Zoning Commission were mailed to Attorney Kohler on August 18, 2006.

If you should have any questions please feel free to contact me at 649-8066, ext. 114.

Sincerely,

Stuart B. Popper
Interim Town Planner



Town of Bolton

222 BOLTON CENTER ROAD • BOLTON, CT 06043

LAND USE DEPARTMENT
(860) 649-8066

August 18, 2006

Julie D. Kohler, Esq
Cohen and Wolf, PC
PO Box 1821
Bridgeport, Connecticut

Dear Attorney Kohler:

The Town of Bolton Planning and Zoning Commission opened a public hearing on July 12, 2006 and continued the public hearing on August 9, 2006 to receive comments from the public concerning the proposed Construction, Operation and Maintenance of a Telecommunications Facility at 12 Carpenter Road, Bolton, CT proposed by MCF Communications bg Inc. MCF proposes to construct a 150 foot tall steel monopole in a 70' by 70' compound about 400' from the road.

The following questions and concerns were raised during the public hearings:

The PZC requests specific information regarding the status of discussions with the Town of Manchester Water Department on the two sites, identified in appendix C as Map 6/Block 27/Lot 22 and Map 5/Block 28/Lot 2. The PZC also requests that MCF Communications explain what are the access issues that limit the use of these two sites.

The PZC is concerned as to whether or not MCF has made enough efforts to locate another site which may be less intrusive to the residential neighborhood.

The PZC is concerned as to whether or not MCF has investigated the possibility of locating the tower closer to I-384 on State owned property and decreasing the height and modifying the appearance to make the tower blend with the existing landscape.

The PZC requests information the proposed wattage and frequency to be generated by the tower.

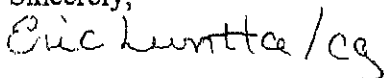
The PZC requests more information on possible alternative designs and colors for the tower.

The PZC requests more information regarding the status of the portion of the property designated as "Protected Forest Zone" and its relationship to the site of the proposed tower. The PZC is concerned about the impact any change of use may have on the status of the "Protected Forest Zone" land is it is protected under Public Act 490.

The PZC is concerned about what will happen when a tower becomes obsolete and who will be responsible for its removal. The PZC recommends that bonding for the removal of the tower may be an appropriate consideration.

In addition, a petition against the proposal, signed by 17 residents of Carpenter Road and Riga Lane neighborhoods was submitted at the public hearing. The petition states that the residents are highly opposed to the tower being proposed at 12 Carpenter Road. The petition notes that the tower would have adverse affects on the overall property value and/or entire way of life as we know it to be at this time. Attached is a copy of the petition and articles submitted expressing concern about cell towers. Also attached are copies of other letters received at the Public Hearing.

Sincerely,

Handwritten signature of Eric Luntta in cursive, followed by a forward slash and the initials 'cg'.

Eric Luntta
Chairman Planning and Zoning Commission

CC: Mr. S. Derek Phelps
Mr. Michael McFadden

Encl.

July 10, 2006

Town of Bolton
Planning and Zoning Commission
Eric Luntta, Chairman
222 Bolton Center Rd
Bolton, CT 06043

Re: Proposed Cell Telecommunications Tower at 12 Carpenter Rd, Bolton, CT

Dear Planning and Zoning Commission members,

It has been brought to our attention that a cell tower proposal has been submitted to your commission. The following are our concerns and comments as Town of Bolton residents of 6 Riga Lane.

- Per letter dated May 12, 2006 from MCF Communications, Inc. to Jonathan Treat at Bolton Center Rd., Town of Manchester Water Dept and Terry Veo owner at 12 Carpenter Rd. It is our understanding that the response according to MCF Communications, Inc. was from: Jonathan Treat, "the registered letter was received on August 10, 2005 (copy of return receipt included) with no response. In follow-up phone calls Mr. Treat advised he was not interested in leasing his land". The Town of Manchester Water Dept. gave "no response to date from the certified letter sent". Terry Veo responded "stating her interest in leasing a portion of the lot". Our concern is that there was no response from the Town of Manchester and no further attempt made by MCF for their response.
- Could there perhaps be an equally beneficial cell communications tower site at a less intrusive location to the residential home owners in the area?
- Is it possible to modify the intended tower by changing the location to further move it to I-384, decreasing the height or altering the appearance to blend more with the existing profile of the land?
- What could the future alterations to the tower be? Re: possible additional users, height

and lighting.

- It is a concern to us as homeowners in the town as to how the tower will effect our property value. In the research that we have made there is a definite negative impact to us as property owners in such a close proximity to the proposed tower.

Sincerely,

The image shows two handwritten signatures in black ink. The first signature is a cursive 'Lucienne Carrier' and the second is a cursive 'Kevin Dowd'.

Lucienne Carrier
Kevin Dowd



Town of Bolton

222 Bolton Center Road • Bolton, CT 06043

Conservation Commission

Town Hall: 649-8743, ext. 110

E-Mail: TOBCC@aol.com

Web: <http://boltonnews.org/conservationcorner.html>

July 12, 2006

Mr. Eric Lunfa, Chairman

Planning and Zoning Commission

Town of Bolton

222 Bolton Center Rd

Bolton, CT 06043

Dear Eric:

The Bolton Conservation Commission would like to convey concerns that were brought up at our last regular meeting on Monday, July 10, 2006 regarding the proposed Monopole Communication Tower planned for 12 Carpenter Rd.

Cell Towers are cropping up all over eastern Connecticut despite a number of valid objections by various community members. It is our belief that in addition to a number of health and safety questions the Planning and Zoning Commission should take a more active role in considering the following questions.

- Is the proposed location the only existing location or are there alternative locations available closer to the highway away from a residential neighborhood such as the existing tower located very close to the eastbound lanes on I-84 near Westfarms Mall in West Hartford?
- Could property values in the area decrease due to the aesthetic impact and permanently altered viewshed? Improper tower location could lower property tax revenue and potentially increase taxes.
- Has co-location been addressed? The tall tower on Box Mt does not have wireless carriers. Why?
- Are health concerns justified -- Are the radio frequency radiation exposure standards reliable and current? Due to increased exposures of radio frequency radiation used in all wireless technology state-wide it is our belief that this needs to be addressed at the local level.

- Are health concerns to humans the only concern – Apparently, millions of birds are killed every year when they collide with towers. How about affects to the wildlife in the area and the potential for invasive plants to propagate on any disturbed areas and along access road?
- Has a historical and/or environmental survey been conducted on the proposed affected area?

It is our understanding that if this proposed tower defies "local rule" many design alternatives exist that could reduce the loss of tax revenue by looking more aesthetically pleasing. Existing towers have been constructed to look like tall pine trees in Sharon, Mystic, Barkhamsted and Hebron. Others have been painted camouflage, constructed inside church steeples, on top of water towers, in cemeteries as crosses and in suburbs as flag poles.

The continued cropping up of communication towers in Bolton and in eastern Connecticut constitutes one of the most significant alterations of viewsheds and the natural environment, with the possibility of major impacts on human health.

Private interests should not be allowed to profit at the expense of our health, scenic beauty, open space and property tax base.

We appreciate the opportunity to comment and are willing to answer any questions regarding our concerns.

Sincerely,

/s/ Rodney E. Parlee

Rodney E. Parlee
Chairman



I, being a resident of the town of Bolton would be highly opposed to the possible communication/cellphone tower that is being proposed at 12 Carpenter Road, Bolton. I, being a resident of said town feel this would have adverse affects on the overall property value and or entire way of life as we know it to be at this time without any such interferences.

PRINT NAME AND ADDRESS

1. Michael Pelletier 10 Riga Lane Bolton Ct.
2. Debra Myette 18 Riga Lane Bolton Ct. Debra Myette
3. Angelo & Carol Gesmundo 14 Riga Lane, Bolton, Ct Angelo Gesmundo
4. DONALD CASSELLS 15 RIGA, Bolton Ct, Don Casells
5. Dennis Judd, 2 Riga Ln Bolton, Dan Judd
6. Marcia Morris - 19 Riga Ln Bolton
7. Kathy Morris - KATHRYN MORRIS, 19 RIGA LANE
8. Christophers Urieare Christophers URRINO BOLTON, CT
11 Carpenter Rd. Bolton
9. Angela Dilberto Angela Dilberto 11 Carpenter Rd Bolton
10. Junita Strazda Junita Strazda 18 Bolton Center Rd
11. Donald Strazda Donald Strazda 18 Bolton Center Rd
12. Leanne Strazda Leanne Strazda
13. Kimberley WANDERSON 3 Riga Ln. Bolton, CT 06043
14. Philip Anderson 3 Riga Lane Bolton, CT 06043
15. Thomas H. Chang 9 Carpenter Rd Bolton, CT. 06043
16. Kuan Chang 9 Carpenter Bolton, CT. 06043
17. Robb Goehring 19 Bolton Center Rd Bolton Ct 06043
- 18.
- 19.
- 20.

**COMMUNICATIONS TOWER SITINGS: THE TELECOMMUNICATIONS ACT OF 1996 AND THE
BATTLE FOR COMMUNITY CONTROL**

*SUSAN LORDE MARTIN †

RECEIVED

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I. Introduction

The Telecommunications Act of 1996¹ (Act) was enacted by Congress on February 8, 1996, primarily to promote a pro-competitive, deregulatory environment for telecommunications providers that would in order to secure lower prices, better service, and faster access to new technologies for consumers.² Universal service is also a cornerstone of the congressional plan.³ The Act's chief method of accomplishing these goals is the "removal of barriers to entry"⁴ into the businesses of telecommunications services, including those provided by local, and long distance telephone companies and video, cable, and wireless companies.⁵ This plan sounds laudable and seems to be one to which most consumers would subscribe. Nevertheless, Congress recognized that difficulties might arise in its implementation if state and local governments attempted to exert their jurisdiction in ways that would erect or maintain barriers to telecommunications facilities.⁶

One such problem involves the siting of telecommunication towers and antennas. This problem existed before the new Act became law and continues to create rancor and litigation. From one end of the country to the other, communities have been fighting against telecommunications companies that want to put facilities in their neighborhoods.⁷ The new law, rather than solving the problem, exacerbates it by providing ammunition for both sides of the controversy. On one hand, the Act states that "[n]o State or local statute or regulation ... may prohibit ... the ability of any entity to provide any interstate or intrastate telecommunications service;"⁸ while, on the other hand, the Act provides that "[n]othing in this section shall affect the ability of a State to impose ... requirements necessary to ... protect the public safety and welfare, ... and safeguard the rights of consumers."⁹ These provisions make it reasonable for telecommunications companies to argue that a local zoning ordinance cannot prohibit the construction of a tower in the location and of the dimensions necessary for seamless cellular phone service. Local residents, however, can also make a compelling argument that zoning rules limiting the size and placement of telecommunications facilities protect their economic and emotional welfare.

This article first describes the problem that arises when telecommunications companies seek to erect towers in order to provide cellular phone service. It then discusses the relevant provisions of the Telecommunications Act of 1996 and the role of the Federal Communications Commission (FCC) in implementing them. Next, the article surveys the cases that have dealt with the cellular tower issue. Finally, the article concludes that Congress should amend the Act to define

acceptable methods of state and local regulation of communication facilities and to require that, in support of their applications for variances, communication service providers demonstrate that they have taken into consideration the interests of local residents in siting their facilities. Congress should also amend the Act to allow states and local governments to rely on evidence of health and environmental effects when making decisions about the location of communications facilities, even when that evidence contradicts FCC standards. In the meantime, the FCC and the courts should use their power to preempt state or local requirements only after giving due consideration to the rights and interests of affected local residents.

II. Local Community Residents Oppose Cellular Phone Towers

Cellular phone service was first offered in the United States in 1983.¹⁰ Since then, telecommunications businesses have been attempting to erect towers with antennas in or near almost every local community in order to provide service that reaches every area of the country.¹¹ A few years ago there were several thousand telecommunications towers in the nation.¹² Today, there are about 25,000.¹³ Experts estimate that by 2002, there will be 100,000 towers.¹⁴ Although cellular phones have become very popular, and people want service with good sound quality, most are unwilling to obtain it if the price is living next to, or within viewing distance of, a tower.¹⁵

There are two primary objections raised to the proximity of telecommunications towers to residential neighborhoods. First, people are concerned about the health risks associated with electromagnetic fields generated by cellular phone facilities.¹⁶ Even though there is no conclusive evidence that electromagnetic fields are cancer-causing, particularly at the low levels emitted by cellular phone transmitters,¹⁷ there is also no conclusive evidence that they are not. In fact, many studies have found a correlation between exposure to electromagnetic fields and cancer.¹⁸ Therefore, with twenty-two countries still studying the health effects of exposure to electromagnetic fields, people remain afraid.¹⁹ Second, people are concerned that proximity to a tower will lower their property values.²⁰ The manager of a real estate brokerage office in New York has called the towers "the kiss of death," claiming that a home with a tower in its backyard can sell for twenty-five percent less than a comparable home without a tower.²¹ Homeowners are also concerned for their own visual comfort, because of the poor aesthetics of the tower facilities.²²

The conflict between the goals of telecommunications companies and those of residents of local communities has created disputes that end up being resolved by courts. After the companies select sites that maximize communication distance and quality, local zoning ordinances frequently require them to obtain variances for non-conforming uses.²³ It is not unusual for the community zoning board to respond to citizens' complaints and deny the application for a variance. The telecommunications companies are prepared for this result and appeal the denial in court, where they frequently win.²⁴ If the zoning board grants the application for the variance, it is likely that community residents will not appeal the decision because they lack the financial resources; if they do appeal, they usually lose.²⁵

The playing field is not level when local citizens, attempting to protect their physical, emotional and economic health, are required to battle in court against large telecommunications corporations with vast financial resources and experience in litigating these kinds of cases. Unfortunately, the Telecommunications Act of 1996 does nothing to reduce the need for or likelihood of litigation when these corporations decide to erect cellular phone towers in residential neighborhoods.

III. The Telecommunications Act of 1996 and Its Effect on Local Regulation of Cellular Tower Facilities

The Telecommunications Act of 1996 describes itself as "[a]n Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage

COMMUNICATIONS TOWER SITINGS: THE TELECOMMUNICATIONS ACT OF 1996 AND TH... Page 3 of 8

the rapid deployment of new telecommunications technologies."²⁶ To accomplish those goals, the Act provides in subsection 253(a) that "[i]n general-[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."²⁷ When the House of Representatives was debating a version of the Act, some members, while agreeing that local communities should not be able to prohibit access to new communications facilities, expressed concern that the foregoing language might have the undesirable result of keeping counties, cities, and towns from enforcing their zoning and building codes.²⁸ One member declared that nothing in the Act should "preempt[] the ability of local officials to determine the placement and construction of ...new [cellular phone] towers. Land use has always been, and ... should continue to be, in the domain of the authorities in the areas directly affected."²⁹

The Act goes on to say in subsection 253(b), that states shall maintain their ability "to impose ... requirements necessary to ... protect the public safety and welfare"³⁰ However, that language is followed, in section 253(d), by the warning that if the FCC³¹ "determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) ... the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."³²

In its instructions to the FCC regarding the regulation of mobile communications services, Congress directed the Commission to consider "safety of life and property," "efficiency," "competition," and the provision of services to the "largest number of feasible users."³³ Congress also specified that states and local governments could not keep companies from providing mobile services or regulate the rates they could charge, but states could regulate other terms and conditions of mobile communications services.³⁴ Specifically, states and local governments can regulate "the placement, construction, and modification" of service facilities with the following limitations.³⁵ State and local regulation may not "unreasonably discriminate among providers" or "prohibit or have the effect of prohibiting the provision of personal wireless services."³⁶ Furthermore, when a communications service provider requests authorization to construct facilities, the state or local government must act on the request "within a reasonable period of time" and must support any decision to deny a request with "substantial evidence contained in a written record."³⁷ Any provider issued such a denial or adversely affected by a failure to respond to such a request may, within thirty days, commence an action in any court with jurisdiction, and the court must hear and decide the case "on an expedited basis."³⁸ The Act also specifically prohibits states and local governments from regulating the placement and construction of communications facilities, like antennas and towers, on the basis of the environmental effects of electromagnetic fields if the facilities meet FCC standards for emissions.³⁹ If states or local governments ignore this prohibition, then any provider adversely affected may petition the FCC for relief.⁴⁰

Both cellular phone service providers and local community zoning boards opposing proposed tower facilities can claim some support in the Act for their positions. The Act gives the latter the right to use zoning regulations to protect the welfare of citizens threatened by towers; it imposes limitations, however, such that the advantage is clearly with communications corporations. Allowing states and local governments to regulate the placement of cellular phone towers, except when such regulation will have the effect of prohibiting the provision of cellular phone service, will give the service providers a very easy argument for having any regulation voided: if they are denied a variance to use the site of their choice, the service providers will assert that any other site would not be as cost-effective and, therefore, either they must be given permission to use their chosen site or they will not bring service to the local area. Moreover, requiring the expeditious resolution of these disputes gives a distinct advantage to the corporations that have staffs of lawyers and engineers, previously prepared research, and litigation experience with similar cases. Local residents have none of these, and very limited financial resources with which to try to match the corporations. To require that they quickly catch up to their opponent's levels in research and expert support renders the residents position untenable in most cases.

COMMUNICATIONS TOWER SITINGS: THE TELECOMMUNICATIONS ACT OF 1996 AND TH... Page 4 of 8

The Act pays lip service to the importance of local zoning regulation, sufficient to encourage litigation, but without any genuine recognition of the importance of a homeowner's property values, peace of mind, and, particularly, health concerns. The Act denigrates health concerns by assuming that FCC standards for electromagnetic emissions will protect the public health. That assumption is premature, given the large amount of ongoing scientific research on the subject and the lack of clear conclusions. The Congressional Conference Report indicates that the Act preempts state and local regulation of the environmental effects of electromagnetic emissions when it has requirements beyond those of FCC rules.⁴¹ This preemption discourages states from doing their own research on the health effects of these emissions because they cannot rely on the results in formulating regulations.⁴² That result does a disservice to the public. The FCC, in promulgating its rules setting a specific absorption rate limit for electromagnetic emissions at four watts per kilogram, noted that research in this area related to human health and safety is ongoing and that changes to recommended exposure limits are possible in the future.⁴³ With that admitted uncertainty, it is unreasonable to limit what states and local governments may do to protect their residents.

Some local governments have imposed temporary moratoria on the issuance of such permits, to allow themselves time to study the impact of cellular communications antennas and towers before granting permission for their construction.⁴⁴ In early 1997, the Cellular Telecommunications Industry Association responded by filing a petition with the FCC for a declaratory ruling seeking preemption of such moratoria on the grounds that they violate the Telecommunications Act of 1996 and that the Act authorizes FCC preemption.⁴⁵ The FCC should deny the petition using the reasoning articulated by the United States District Court for the Western District of Washington in one of the few cases concerning the siting of telecommunications towers decided since the Act went into effect.⁴⁶

IV. Judicial Resolution of Telecommunications Tower Siting Disputes Since the Enactment of the Telecommunications Act

Three months after the Act was signed into law, a federal district court in Washington State decided a case challenging a six-month moratorium on issuing permits for new telecommunications facilities established by the City of Medina.⁴⁷ Medina has about 3,000 residents, and is approximately two and one-half square miles in area, zoned entirely for low-density residential use. It is a prime location for cellular phone towers, however, because of its proximity to a state highway and a bridge.⁴⁸ For several years, Medina has had cellular phone facilities belonging to two service providers, but after the Act became effective, the city expected additional applications for tower construction permits and feared becoming an "antenna farm."⁴⁹ Five days after the effective date of the Act, Medina's moratorium went into effect in order to give the city time to study the allocation of suitable sites.⁵⁰ One month later, Sprint filed a lawsuit alleging that the moratorium violates the Act because any delay in its obtaining full cellular phone coverage in the region would cause it to lose a great deal of money resulting in irreparable harm to the company.⁵¹

The court noted that Medina citizens were concerned about the health hazards and negative aesthetic effects associated with cellular phone towers, but emphasized that if the city did not have time to study the appropriate siting of facilities, there may not be adequate sites for competing providers.⁵² Thus, without the careful allocation of sites, beneficial services might be rendered unavailable.⁵³

The court provided an instructive analysis of the relevant portions of the Act. To Sprint's claim that the moratorium "prohibit[s] or [has] the effect of prohibiting the provision of personal wireless services," the court responded that the moratorium was not a prohibition, but merely a short-term suspension.⁵⁴ To Sprint's contention that the moratorium kept the city from "act[ing] on" its application "within a reasonable period of time," the court averred that the language in the Act did not suggest that Congress "intended to force local government procedures onto a rigid timetable where the circumstances call for study, deliberation, and decision-making among competing applicants."⁵⁵ The court concluded that the Act's legislative history indicated that Congress did not intend to give preferential treatment to the

COMMUNICATIONS TOWER SITINGS: THE TELECOMMUNICATIONS ACT OF 1996 AND TH... Page 5 of 8

telecommunications industry in the processing of zoning applications.⁵⁶

Finally, the court held that Medina's six-month moratorium on issuing new permits for telecommunications facilities for the purpose of information-gathering did not violate any provisions of the Telecommunications Act.⁵⁷ Thus, the court interpreted the Act's provisions in a light most favorable to the retention of some local control over the environment in which residents live, keeping the profit-making motives of telecommunications corporations from being the ultimate value in the regulation of telecommunications facilities.

In *BellSouth Mobility, Inc. v. Gwinnett County, Georgia*,⁵⁸ the United States District Court for the Northern District of Georgia interpreted section 332(c)(7)(B)(iii) of the Act, which requires that a denial of a telecommunications service provider's application to construct facilities be "supported by substantial evidence contained in a written record."⁵⁹ In this case, BellSouth applied to the Gwinnett County Board of Commissioners for a permit to erect a 197-foot monopole that would improve the quality of its cellular telephone service.⁶⁰ In support of its application, BellSouth provided the following documents: a report by the Airspace Safety Analysis Corporation showing that the monopole was not hazardous to aircraft, a certified appraiser's report concluding that monopoles did not decrease property values, a line of sight survey, prepared by Aerial Instrument Research Systems, showing the visibility of a red balloon floated to varying heights at the proposed site, and a list of BellSouth's unsuccessful efforts to find other suitable sites.⁶¹ Residents, on the other hand, submitted no documents, relying merely on a representative who attended a Board hearing and made conclusory expressions of concern regarding the monopole's safety, health, aesthetic, and economic threats.⁶² Based on this record the court held that the Board violated the "substantial evidence" provision in the Act.⁶³

The court then had to decide on the appropriate remedy.⁶⁴ Although the Act allows anyone denied a permit for telecommunications facilities to seek relief "in any court of 'competent jurisdiction'," it does not specify the remedy for violation of the Act.⁶⁵ The choices available to the district court were to remand the matter to the Board for it to make a decision supported by substantial evidence or to order the Board to issue the permit for the monopole. The court did the latter, explaining that the Act requires the court to "hear and decide such action on an expedited basis" and, therefore, a mere remand would thwart the intent of the Act to encourage the expeditious installation of new telecommunications facilities.⁶⁶

This case illustrates why, in fairness and concern for citizens' ability to exert their rights, the Act should give some deference to local governments in their disputes with telecommunications corporations regarding the location of telecommunications towers and antennas. BellSouth had knowledge, experience, legal counsel, and the financial resources to have experts prepare reports in support of its application for a permit to erect a 197-foot monopole. Local residents had none of those resources. That lack does not necessarily indicate that there was no substantial evidence to support their position, but perhaps merely that they did not know they needed it, did not know where to get it, or did not have the financial resources to pay for it. Moreover, in this kind of situation, government representatives may not be of much help, because they are also lay people with budgetary constraints and, therefore, they are no match for business adversaries.⁶⁷

*Illinois RSA No. 3, Inc. v. County of Peoria*⁶⁸ also illustrates the poor preparation of the residents who opposed the construction of a 140-foot cellular transmission monopole. The United States District Court for the Central District of Illinois noted that the local zoning board received a petition signed by 200 people opposing the monopole, but that there was no indication of the basis for their opposition.⁶⁹ A realtor with twenty-four years experience objected to the monopole because it would cause a decrease in property values, but offered no analysis, studies or examples to support the reasonableness of the objection.⁷⁰ Lastly, the residents presented a survey that was meant to show that potential home buyers would not buy a home near a telecommunications tower.⁷¹ The court concluded that there was no evidence of the survey's statistical or scientific merit, however, because there was no information on how the survey

COMMUNICATIONS TOWER SITINGS: THE TELECOMMUNICATIONS ACT OF 1996 AND TH... Page 6 of 8

was conducted or how the respondents were chosen.⁷²

On the other hand, Illinois RSA, the telecommunications provider, presented evidence from three certified real estate appraisers indicating that cellular transmission towers do not cause real estate prices to fall.⁷³ One presented an analysis of similar tower sitings at other locations that indicated that towers did not have an adverse effect on property values.⁷⁴ Illinois RSA had an engineer and surveyor present line of sight drawings demonstrating that the tower would not be visible from nearby residences.⁷⁵

The Peoria residents also stated their concerns about the health effects of living close to telecommunications transmission facilities, but the court held that under the Telecommunications Act, health effects could not be considered as long as emissions were within the standard set by the FCC.⁷⁶ Thus, the court concluded that there was no substantial evidence, as required by the Telecommunications Act,⁷⁷ to deny Illinois RSA's request to construct its tower.⁷⁸ It also concluded that the county of Peoria had violated the Act "in the most basic way" by not issuing a written statement containing the reasons for its denial.⁷⁹ In deciding on a remedy, the Illinois district court, citing the *Gwinnett County* case, rejected the option of remanding the case to the county zoning board for reconsideration and a written decision.⁸⁰ The court concluded that such a course "would be a waste of time and would frustrate the Telecom Act's direction to expedite these proceedings."⁸¹ Instead, the court issued an injunction directing the county to issue a permit for the tower and to remove any obstacles to its construction.⁸²

The United States District Court in New Mexico also cited *Gwinnett County* in providing mandamus relief for Western PCS II Corporation, a telecommunications company that had been denied a special exception request to mount antennas on an existing water tank by the zoning authority for Santa Fe.⁸³ In this case, the Santa Fe zoning authority failed to comply with what the district court deemed the "most basic of the Telecommunications Act's requirements," a written record supporting its denial of the company's request.⁸⁴ This led the judge to resist remanding the matter, because the court could not find the "substantial evidence" upon which the zoning authority must rely to sustain its denial of a permit.⁸⁵ The only evidence submitted by those opposed to the antennas was the expression of "generalized concerns" by several neighbors.⁸⁶ Moreover, those concerns centered on a "visual blight in the neighborhood," even though the antennas were going to be no higher than the already-existing water tank, they were going to be painted to match the color of the tank, and Western PCS was going to remove graffiti from the water tank.⁸⁷ As presented by the court, the facts of this case make the objectors' case seem very weak, but it is hard to know whether it was objectively weak or just poorly presented.

In contrast to the federal district courts in Georgia, Illinois, and New Mexico, the state court of appeals in Wisconsin held that, in light of the Act, a remand to the local zoning authority for reconsideration of its decision to deny a permit for the construction of a 200-foot telecommunications tower was an appropriate remedy.⁸⁸ The Wisconsin court considered the Act's language requiring courts to hear these cases on an expedited basis, but did not relate that mandate to the remedies available to courts. The body of case law on the subject is still much too small to draw any general conclusions, but it will be interesting to note whether any pattern emerges of federal district courts construing the Act strictly, or of state courts deferring to local zoning authorities.⁸⁹

These cases suggest that the Act has not sufficiently clarified the role of state and local governing bodies in making decisions about the siting of cellular phone towers to discourage litigation. To the contrary, the statute creates new questions about what constitutes "the effect of prohibiting the provision of personal wireless services," what is "a reasonable period of time" for acting on requests to construct telecommunications facilities, and what kind of regulating is actually left for local governments to do regarding such construction. The latter question includes the specific issue of what health and welfare or safeguarding the rights of "consumers" can mean, particularly when state and local governments cannot consider the possible effects of human exposure to electromagnetic fields.

V. Discussion and Conclusions

Congress clearly intended for the 1996 Act to limit state and local regulation of the telecommunications industry.²⁰ The idea was to eliminate regulatory barriers to promote competition in the industry in order to encourage technological advancement and to give consumers choices.²¹ In its zeal to accomplish these goals, however, Congress neglected to sufficiently consider the interests of local residents, other than the interests they have as consumers of telecommunications services, and the advantages given to the industry vis-à-vis citizens.²² To rectify this oversight, Congress should amend the Telecommunications Act in four specific ways.

First, the Act should clarify the conditions of mobile communications services that state and local governments can regulate. These conditions should include the siting of facilities and the specific form that the facilities take, although the regulations should not result in the barring of service in the area. It is reasonable for people to be concerned about the effects of proximity to cellular phone towers on health, their property values, and the aesthetics of a home's landscape. It is unfair to dismiss these interests as merely symptoms of the "not-in-my-backyard" (NIMBY) syndrome and, therefore, interests to be ignored when the proliferation of cellular phone sites is at stake. In fact, there is nothing in the Telecommunications Act of 1996 that encourages telecommunications companies to take these interests into consideration in siting their facilities.

Second, Congress should require service providers to include substantial evidence that they are requesting siting permits for the least intrusive facilities available in the least intrusive locations under the circumstances. Such a requirement, in addition to addressing some of the concerns of local residents, would promote the congressional goals of advancing technology and encouraging competition. There are many ways of making communications facilities less intrusive-hiding antennas is one²³-but they may be more expensive than the installation of a traditional 200 or 300-foot tower.²⁴ For example, microcells do not have the same height and power requirements as macrocells, but a larger number of the microcells are needed to provide widespread coverage.²⁵ Microcells do not have to be located on high towers; they can be installed in church steeples, on rooftops, and even inside offices where they would not be noticed.²⁶ They can be attached to utility poles and lamp posts with cables running down to equipment located in underground shelters.²⁷ There are also coverage enhancer systems that can reduce the number of necessary towers by one third to one half depending on the terrain.²⁸

Third, the Act should allow state and local governments to rely on scientifically objective evidence of the health risks associated with electromagnetic fields when making decisions regarding the siting of communications towers and antennas. There are clear advantages to having a national policy on telecommunications. Nevertheless, because there are such wide disparities within the worldwide scientific community about the effects of electromagnetic fields (even at low levels) on human health, it should be up to local communities to decide how much risk they are willing to undertake.

Finally, the Act discourages study and planning with its "prohibit or have the effect of prohibiting the provision of personal wireless services" and "within a reasonable period of time" language.²⁹ This language should be clarified to allow a realistic amount of time for communities to plan for the best use of their resources. For example, companies can be required by zoning boards to share sites (known as co-location)¹⁰⁰ in an effort to reduce the number of towers, but for a local government to be able to create such requirements supported by substantial evidence, however, it would need the time to study and formulate an all-encompassing plan for the community and potential permit applicants. Current language does not, of course, prohibit planning, but it encourages service providers to commence court actions when a permitting agency does not expeditiously grant a permit application.


Legislative clarification is preferable to the ad hoc decision-making that courts will be required to do. Nevertheless, when judges are presented with these cases, they should keep in mind that the Act specifically allows local regulation

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of the terms and conditions of telecommunications services, and that the other provisions in the Act cannot render that provision meaningless.

Congress could not have meant for the Telecommunications Act to imply that having cellular phone service is more important to a community than having the freedom to decide what health risks are worth undertaking or than maintaining the value of neighborhood homes: the most valuable asset most homeowners have. Nevertheless, as written, the Act does not give corporations that provide cellular phone service any incentive to work cooperatively with the communities they intend to make their customers. Congress has overestimated the role that competition would play in giving local residents input in the siting of telecommunications towers. Residents and cellular phone customers, particularly in more rural areas, have not had a variety of service providers vying for their business. When there is only one provider in the area, it does not have to curry favor with potential customers by being a good neighbor.

With no evidence that Congress intends to amend the Act in the very near future, and because once towers are erected they are probably in place permanently, it will be up to courts to interpret the Act in an even-handed manner according to its language. If courts give local communities the leeway to regulate the terms and conditions of tower sitings in a thoughtful manner that will not prohibit the availability of service, the damaging effects of a poorly designed statute can be controlled.

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January 24, 2000

ZONING; VARIANCES; TELECOMMUNICATIONS—An applicant seeking a use variance to continue its non-permitted telecommunications use should have introduced expert testimony that there were no other suitable sites and that use of the requested location would actually improve communications in the area.

A telecommunications company owned a property in a residential zone. The property contained a ranch house. About twenty-five years earlier, a 97-foot-high steel monopole communications tower had been erected in the middle of the backyard, about 40 or 50 feet from the residence. This was a non-permitted use under the municipal zoning ordinance and thus was illegal. The house was rented to tenants who had no relationship to the operation of the tower. A time came when the municipality's code enforcement officer directed the owner to remove all antennae installed since the property had been purchased. Shortly thereafter, the officer denied a permit to an electrical contractor who sought to install a sub-panel to increase the electrical service for the tower's antennae. The property owner then applied for a use variance, seeking permission to replace the tower with one that was two feet shorter, but at a slightly higher elevation. The application also requested variances for an expansion for a nonconforming use, set back and side yard relief, and relief from height restrictions in a residential zone. It argued that the communications tower was an inherently beneficial use, and also argued that if the present location could not be continued, the petitioner would require two or three other locations to cover the same pattern. The telecommunications company also presented testimony that the tower was in a unique location allowing for "line of sight technology" and also that the existing monopole was an integral component of an overall communications system. The zoning board unanimously denied the application. It objected to the site being located in a residential zone, bordered by residences to the north and south. Further, the proposed tower would be directly behind an existing garage, whereas the current tower was in the middle of the rear yard. The eight-foot-higher tower would violate the municipality's zoning ordinances, and the existing tower did not constitute a preexisting, nonconforming use. Further, the resolution noted that the current property owner knew when it acquired the property that it was zoned for residential use and that no variances had ever been granted to allow the existing tower. Moreover, the applicant was not a single-user service, but was in competition with many other like providers (of paging services). In conclusion, the zoning board felt that the applicant had not demonstrated "exclusive public safety or public need" for the tower, nor that failure to approve the site would hinder public safety or governmental use for that type of facility in the area. It further concluded that "the

tower was not an inherently beneficial use, but merely a commercial benefit for a commercial user." Lastly, it found that the applicant failed to demonstrate that "locating the tower in a residential zone would not impair the intent of the zoning scheme and adversely affect the surrounding neighborhood, real estate values, and public safety and health." The lower court overturned the board's decision, but the Appellate Division reversed the lower court. It found that the issue was whether the applicant was entitled to a variance to locate or continue its tower in a district where those uses and structures were not permitted. New Jersey case law has rejected the concept that construction of a communications tower constitutes an inherently beneficial use. Holding an FCC license can, however, satisfy the first requirement of the positive criteria and establish that the facility serves the general public welfare. An applicant for a variance to construct a communications tower must satisfy the remaining requirements for obtaining a variance, "demonstrating that (1) the chosen site is particularly suited for the proposed use, (2) the application may be granted without violating the negative criteria relating to the intent and purpose of the master plan, and (3) a weighing of the positive and negative criteria shows that granting the variance will not result in a substantial detriment to the public good." Although not required, it is a "better practice" for applicants to present expert testimony concerning the tower's potential impact on the master plan or zoning ordinance. Taking these factors into consideration, the Court held that the lower court erroneously failed to accord any deference to the zoning board's determination. A local zoning determination will be set aside only when it is arbitrary, capricious, or unreasonable. The lower court's record indicated that the judge conducted a de novo review such as would be done by a municipal governing body. At the conclusion of oral argument, the lower court judge "inappropriately, considering the standards of review, requested that the attorney for each party provide 'findings of fact and appropriate conclusions for my consideration,' even though the Board's findings and conclusions already had been memorialized and were before the court for review." Except for one minor point, the lower court's opinion did not discuss the zoning board's findings. It gave no deference to the zoning board's decision, "let alone the greater degree of deference ordinarily accorded a zoning board's denial of a variance." The Appellate Division was satisfied from its review of the record that the board's decision was fully supported and was consistent with the conclusions expressed by other courts in most recent case law. Assuming the applicant possessed an FCC license, and thus served the general public welfare, it made no showing of how the tower would improve communications in the area. It made no attempt to discover if the tower could be located on other sites in non-residentially-zoned areas of the municipality or neighboring communities. Its engineer had not visited the site; its geotechnical engineer had done no borings and had not been informed of the loading conditions for the tower. Its real estate appraiser conducted no sales studies of the neighborhood. As to the allegation that denial of the variance violated the Telecommunications Act of 1996, the zoning board successfully argued that "because the intent and effect of its decision was to require that communications towers be located in more suitable zone within the [municipality], not to ban them altogether, its action was permissible under the Act. Consequently, the Court agreed that the Telecommunications Act was inapplicable here because there was no evidence that the zoning board's decision effectively prohibited access to the wireless use served by the applicant's tower. The board's decision acted as a "neither a moratorium nor a blanket prohibition," but was "just one decision in a municipality that permits wireless facilities in other locations."